

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YAO YANG,

Petitioner,

v.

ALBERTO R. GONZALES, et al.,

Respondents.

CASE NO. C07-31-RSL-MJB

REPORT AND
RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Yao Yang is a native and citizen of China who is being detained by the United States Immigration and Customs Enforcement (“ICE”) pursuant to a final order of removal. On January 8, 2007, petitioner, proceeding pro se, filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging the statutory and constitutional authority of ICE to detain him any further under *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), due to the unlikelihood of his removal from the United States in the reasonably foreseeable future. (Dkt. #1). On February 12, 2007, respondents filed a Return and Status Report and Cross-Motion to Dismiss, arguing that petitioner had filed a previous habeas petition in this Court challenging his removal from the United States, and had obtained a stay of

1 removal pending a decision on that petition. (Dkt. #8). Respondents argue that they have been
2 unable to remove petitioner from the United States because the stay of removal entered in his
3 previous habeas case is still in effect. On March 16, 2007, however, the Honorable Thomas S.
4 Zilly entered an order and judgement denying and dismissing petitioner's previous habeas
5 petition with prejudice. *See Yang v. Clark*, Case No. C06-1023-TSZ-JPD (Dkts. #19 and #20).
6 Accordingly, the Court's stay of removal in that case is no longer in effect.

7 Having carefully reviewed the entire record, I recommend that petitioner's habeas
8 petition (Dkt. #1) be DENIED, and that respondents' motion to dismiss (Dkt. #8) be
9 GRANTED.

10 II. BACKGROUND AND PROCEDURAL HISTORY

11 Petitioner Yao Yang is a native and citizen of China. (*Yang v. Clark*, Case No. C06-
12 1023-TSZ-JPD, Dkt. #13 at R119). He claims to have entered the United States at New York,
13 New York, on or about November 19, 1992, using a forged Chinese passport. (*Yang v. Clark*,
14 Case No. C06-1023-TSZ-JPD, Dkt. #13 at R35). On November 3, 1993, petitioner filed a form
15 I-589 Request for Asylum with the former Immigration and Naturalization Service ("INS").¹
16 (*See Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #13 at R27-35). During his interview
17 at the asylum office, petitioner admitted his alienage and deportability. (*Yang v. Clark*, Case No.
18 C06-1023-TSZ-JPD, Dkt. #13 at R25-6). The asylum officer determined that petitioner was not
19 eligible for asylum and referred his case to an Immigration Judge ("IJ"). *Id.*

20 On June 3, 1996, the INS issued an Order to Show Cause, placing petitioner in
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23 ¹Effective March 1, 2003, the Immigration and Naturalization Service was abolished
24 pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, *codified at* 6
25 U.S.C. § § 101, *et seq.*, and its immigration functions were transferred to the Department of
26 Homeland Security ("DHS").

1 deportation proceedings and alleging deportability for entering the United States on November
2 19, 1992, without inspection. (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #13 at
3 R166). On February 12, 1997, following a merits hearing, the IJ denied petitioner's application
4 for asylum and withholding of removal, but granted voluntary departure. (*Yang v. Clark*, Case
5 No. C06-1023-TSZ-JPD, Dkt. #13 at R38, R92-102). Petitioner appealed the IJ's decision to
6 the Board of Immigration Appeals ("BIA"). (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD,
7 Dkt. #13 at R104-106). On February 27, 1998, the BIA affirmed the IJ's decision. (*Yang v.*
8 *Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #13 at R112-13). Petitioner failed to depart the
9 United States and his voluntary departure order became an order of deportation.

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11 On July 9, 2002, petitioner filed a Motion to Reopen with the BIA. (*Yang v. Clark*,
12 Case No. C06-1023-TSZ-JPD, Dkt. #13 at R126). The BIA denied that motion on August 23,
13 2002. (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #13 at R167). On June 6, 2006,
14 petitioner was arrested in Anchorage, Alaska. Petitioner has refused to complete an application
15 for travel documents to China, and on June 9, 2006, petitioner was served with a Warning for
16 Failure to Depart, notifying him of the consequences of his failure to cooperate in obtaining
17 travel documents for his removal. (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #13 at
18 R143).

19 On July 20, 2006, petitioner and his wife brought a joint petition for writ of habeas
20 corpus and an emergency motion for stay of removal. (*Yang v. Clark*, Case No. C06-1023-
21 TSZ-JPD, Dkt. #4). On July 26, 2006, the Court granted petitioner's request for a temporary
22 stay of removal pending resolution of the habeas petition. (*Yang v. Clark*, Case No. C06-1023-
23 TSZ-JPD, Dkt. #6).

On January 8, 2007, petitioner filed the instant habeas petition, challenging his continued detention. (Dkt. #1). On February 12, 2007, respondents filed a return and status report and cross-motion to dismiss.² (Dkt. #8). Petitioner did not file a response to respondents' motion.

On February 2, 2007, the Honorable James P. Donohue issued a Report and Recommendation ("R&R"), recommending that petitioner's 2006 habeas petition be dismissed with prejudice. (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkt. #18). On March 16, 2007, the Honorable Thomas S. Zilly entered an order and judgment adopting the R&R and dismissing petitioner's 2006 habeas petition with prejudice. (*Yang v. Clark*, Case No. C06-1023-TSZ-JPD, Dkts. #19 and #20). Accordingly, the Court's stay of removal in that case is no longer in effect.

III. DISCUSSION

"When a final order of removal has been entered against an alien, the Government must facilitate that alien's removal within a 90-day 'removal period.'" *Thai v. Ashcroft*, 366 F.3d 790, 793 (9th Cir. 2004)(citing *Xi v. INS*, 298 F.3d 832, 834-35 (9th Cir. 2002)); INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B)(emphasis added); *see also Khotessouvan v. Morones*, 386 F.3d 1298,

²The Court notes that although the government identified its motion to dismiss as a "cross-motion," the government's return filed in accordance with 28 U.S.C. § 2243 is the moving document establishing the briefing schedule under Local Rule 7(d)(3). Therefore, the government's motion is more accurately identified as a motion to dismiss rather than as a cross-motion.

1 1300 n.3 (9th Cir. 2004) (stating that the 90-day removal period commences on “the date the
2 order of removal becomes final; the date a reviewing court lifts its stay following review and
3 approval of the order of removal; or the date the alien ordered removed is released from non-
4 immigration related confinement.”). During the removal period, continued detention is
5 statutorily required. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (“During the removal period, the
6 Attorney General shall detain the alien.”). Where removal cannot be accomplished within the
7 ninety-day removal period, detention beyond the removal period is authorized by INA §
8 241(a)(6), 8 U.S.C. § 1231(a)(6). In *Zadvydas* the Supreme Court determined that, beyond
9 those ninety days, the government is entitled to a presumptively reasonable period of detention
10 of six months to bring about the alien’s removal from the United States. *Zadvydas v. Davis*, 533
11 U.S. 678, 701, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). After the six month period, the alien
12 is eligible for conditional release upon demonstrating that there is “no significant likelihood of
13 removal in the reasonably foreseeable future.” *Id.*

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15 In the present case, Judge Zilly entered an order and judgement denying and dismissing
16 petitioner’s previous habeas petition on March 16, 2007, thereby lifting the stay and
17 commencing the removal period. *See* INA § 241(a)(1)(B)(ii), 8 U.S.C. § 1231(a)(1)(B)(ii).
18 Accordingly, petitioner’s ninety-day removal period expired on or about June 16, 2007, and the
19 six month presumptively reasonable period will expire on or about September 16, 2007.
20 Accordingly, petitioner’s detention is lawful, and the Court must deny habeas relief.

21 IV. CONCLUSION

22 For the foregoing reasons, I recommend that respondents’ motion to dismiss be granted,
23 and that this action be dismissed. A proposed Order accompanies this Report and
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1 Recommendation.

2 DATED this 10th day of July, 2007.

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5 MONICA J. BENTON
6 United States Magistrate Judge
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